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In The Supreme Court of the United States

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,
v.
THE CLEARING HOUSE ASSOCIATION, L.L.C. AND OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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FRIEDMAN & SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES 1867-1960 (1974) 24

TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) 26

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Forrester, Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders, 74 U. CIN. L. REV. 1303 (2006) 20

Quester & Keest, Looking Ahead After Watters v. Wachovia Bank,

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Williams & Bylsma, On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks, 58 Bus. Law. 1243 (2003) 21

Wilmarth, The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection, 23 ANN. REV. BANKING & FIN. L. 225 (2004) 29, 31

Statement of Interest*

The Conference of State Bank Supervisors (CSBS) is the national association of officials responsible for regulating state-chartered banks and other state-licensed financial services providers. Since its founding in 1902, CSBS has worked to facilitate exchange of information and technical expertise among state regulators, promote policy development and cooperation on interstate issues, improve coordination between federal and State regulators, and enable States and their officials to be heard on matters of national banking policy.

At the core of the CSBS mission is preserving and strengthening the Nation's dual banking system and the policy of competitive equality it reflects. As Congress and this Court have recognized, the state banking system serves an important and distinctive role and has a long record of responsiveness to diverse community needs and of financial, regulatory, and consumer protection innovation. State-chartered institutions pioneered the use of checking accounts and developed the first automated teller machines (ATMs) and interstate electronic funds transfer systems. And the state banking system led the way in protecting consumers: it originated deposit insurance and reserve requirements.

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*No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, or counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

This case and the issues it raises are of utmost importance to CSBS and mission. Although CSBS and its members have worked constructively with federal regulators, including the Office of the Comptroller of Currency (OCC) on regulatory and policy matters, CSBS has expressed deep concern about increasingly aggressive efforts by the OCC to, among other things, deploy its regulatory powers to shelter national banks from consumer protection and fair lending obligations.

In rulemaking comments on the regulation at issue here, CSBS urged the Comptroller to change course, explaining that the regulation would exceed his lawful authority and threaten the banking dual system, and expressed concern that it would have adverse consequences for consumers and homeowners, their communities, the financial system, and the broader economy. Those same considerations bear on this Court's review, and CSBS submits this brief in the hope the Court will keep the OCC within proper, lawful bounds.

Introduction And Summary

The decision below affirmed a judgment, issued at the behest of a federal official, permanently enjoining "[t]he Attorney General for the State of New York, and all those acting under his direction or in concert with him * * * from [*inter alia*] * * * instituting actions in the courts of justice against national banks to enforce state fair lending laws." 396 F. Supp. 2d 383, 407-408.

That judgment was not grounded on a conclusion that Congress had displaced New York antidiscrimination law, either generally or as applied to federally-chartered banks, or that Congress had authorized the federal agency do so. On the contrary,

it is conceded by all that the laws at issue are in effect and enforceable against national banks. Nor, for that matter, was there any finding that exclusive federal enforcement was mandated. The Comptroller agreed that private parties could enforce these same laws against national banks. See 510 F.3d at 120 n.9.

Rather, the judgment rested exclusively on a 2004 OCC regulation, see 12 C.F.R. § 7.400, and on courts' general obligation to accept permissible and reasonable agency interpretations. See *Chevron USA, Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Specifically, the regulation interpreted the National Bank Act prohibition on "visitation" of federally-chartered banks, 12 U.S.C. § 484(a), to mean that valid, non-preempted fair lending, consumer protection and other laws of the 50 States could be enforced by the OCC and by private parties – but not by those holding office under the States that enacted them.

Together, the regime announced by the OCC and the decisions sustaining it represent a startling example of what is not meant to occur under our federal system. Were the Court to sustain the regulation, power to enforce valid, democratically-enacted state laws concerning matters of surpassing local interest will have passed from the officials vested by the States with enforcement responsibility – who have the energy, expertise, and resources to enforce local laws – to a federal official whose primary responsibilities are far removed from the consumer protection field; who is even more insulated from political accountability than other Executive Branch officials; whose powers are often exercised confidentially. New York's (and every other State's) role in executing its own laws is reduced to that of a

federal supplicant, and New York citizens dissatisfied with the enforcement of their laws will have scant means of assigning responsibility, let alone acting on their views.

The regime is, if anything, worse in practical reality than from the perspective of political theory. Whereas hundreds of officials with expertise at the state level stand ready to enforce compliance with consumer protection and antidiscrimination laws, there are now only a handful of federal employees. The federal agency depends on the regulated banks, not Congress, for almost its entire budget; its authority over them depends on their voluntary choice; and it has used – and unapologetically defended – its claimed power to displace state laws as a weapon in competition against other chartering authorities for banks' allegiance.

The state laws involved include many enacted in response to egregious acts of financial predation and commercial discrimination that had reached crisis levels in the States that passed them – behavior that has since played a significant part in plunging the national economy into its present, dire condition.

The court of appeals decision sustaining that asserted authority is startling in its own right. In treating the regulation as a typical exercise in gap-filling, the panel majority denied that special rules grounded in state sovereignty and safeguarding the state-federal balance were even *implicated* by the Comptroller's assigning to himself New York State's (and every other's) power to control the enforcement of its own laws. The decision treated the authority asserted as if it were a "lesser" incident of the "greater," constitutionally orthodox one to preempt state law, and seemed to regard the fact that the

displacement was effected by regulation rather than statute as grounds for less vigilant judicial review. The court then pronounced the regulation valid, on the ground the statutory language was "ambiguous" and Congress had not clearly precluded the Comptroller's assertion.

The majority below misunderstood the Constitution and this Court's precedents. Had Congress legislated the regime just described, it would raise serious constitutional concerns. The Constitution grants the federal government broad powers, but it requires they be exercised in a manner that respects State sovereignty; a statute that placed in the hands of a federal administrator decisions as to when and how important (non-preempted) state laws would be enforced would transgress basic principles of our federal system.

Moreover, a court presented a claim that a federal statute sanctioned such a regime would strain to seek a less troubling construction and, at the very least, require the party advancing that peculiar interpretation to identify a clear indication that Congress had considered and affirmatively intended so dramatic a change in the federal-state balance.

But the regime upheld here is not claimed to derive from a congressional judgment, let alone a plainly expressed one. Rather, it rests on an administrative *regulation* purporting to reinterpret allegedly ambiguous language. Although the proper rule for such cases may defy sound-bite distillation, the logic of this Court's precedents – and the principles of federalism and separation of powers on which they rest – require *more* searching review of assertions of regulatory preemption, including OCC assertions

concerning the preemptive reach of the National Bank Act. A legal regime that relies on the structure and processes of *congressional* lawmaking as the prime safeguard for States' interests cannot permit an agency shortcut.

Although it is especially important that the Court vindicate basic federalism principles here, the regulation itself is so extreme and irrational that it would not survive deferential *Chevron* review. Leaving aside the implausibility of Congress's conferring the extraordinary authority asserted in the obscure and indirect way OCC proposes, the claim that the regulation rests on a permissible reading of ambiguous statutory text fails by its own terms. Nothing in Congress's language hints at the enforcement preemption "interpretation" OCC imposes. On the contrary, both the ordinary, long-settled understanding of "visitation" and a venerable decision of this Court foreclose the notion that § 484(a) creates a class of state laws that are valid and non-preempted – but nonetheless unenforceable by the states themselves.

Indeed, the regulation would fail even minimal reasonableness review: as the majority opinion below recognized, OCC's rulemaking focused entirely on defending the agency's *power* to interpret the provision in the fashion claimed, without any effort to explain why Congress would have authorized the strange enforcement regime – or even why *the OCC* believed it advantageous. In fact, even the shibboleths of "uniform law" and "unitary regulation" the Comptroller reliably invokes in asserting preemptive power provide no shelter for the worst-of-both-worlds enforcement regime the regulation announces, in which authority to enforce a State's laws is wielded by

private parties and federal bank regulators – *i.e.*, *everyone but* the officials the State vested with law enforcement responsibility.

ARGUMENT

As we explain below (and petitioners demonstrate comprehensively), the visitation prohibition could not be given the meaning the Comptroller seeks to impose, even under the forgiving *Chevron* standard, and nothing more need be decided to reverse the judgment and set aside the regulation. As in *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), no especially stringent standard of review is required to reject "the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power." *Id.* at 274.

But to acknowledge that clear statement rules are not needed is not to deny their importance. The lower courts' treatment of this case as a routine challenge to ordinary administrative gap-filling – and failure to perceive that the federalism-respecting rules of construction even were *implicated* – are as startling as the underlying claim of Executive power sustained. Indeed, the decision below fits into a broader pattern of increasingly implausible and aggressive assertions of OCC power to displace state law (or law enforcement) and of increasingly permissive judicial review.

This Court must make clear that principles of federalism – and rules requiring judicial enforcement of them – are plainly and directly applicable in these cases and that judicial intervention is *especially* needed when the departure from the Constitution's allocation

of authority emanates from an Executive Branch agency, not Congress.

I. The Authority Asserted In The Comptroller's Regulation Has No Place Under Our Federal Constitution

The "great innovation" of our constitutional design – that "'our citizens would have two political capacities, one state and one federal,'" – is itself a "protection[] * * * of liberty," *Printz* v. *United States*, 521 U.S. 898, 920 (1997) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J, concurring). The constitutional design "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991).

The dual banking system exhibits these virtues. Although those who first enacted the National Banking Act in 1863 expected that state-chartered institutions would wither away – and imposed punitive, discriminatory taxes to hasten the job, state banking withstood this assault, and in the twentieth century, Congress came to recognize that the Nation was better served by a system that preserved the benefits of experimentation and political accountability; was responsive to diverse community needs and values; and provided a safeguard against unchecked, centralized authority. Major federal statutes reflect congressional commitment to the policy of "competitive equality," *First Nat. Bank in Plant City* v. *Dickinson*, 396 U.S.

122, 133, (1969) (describing policy as "firmly embedded in the statutes governing the national banking system"), as do recently enacted financial reform proposals, see Pub. L. No. 110-289 § 1502 (2008) (encouraging "the States, through the Conference of State Bank Supervisors * * * to establish a Nationwide Mortgage Licensing System and Registry").

But federalism is not the law *because* of its benefits, but rather because the Constitution is binding, and it recognizes State sovereignty. Accordingly, when structural safeguards intended to protect the States and inhibit unconstitutional lawmaking do fail, the federal judiciary has an important, independent obligation to enforce the Constitution. See *New York* v. *United States*, 505 U.S. 144, 157 (1992) ("Our task would be the same even if one could prove that federalism secured no advantages to anyone").

As part of this responsibility, this Court has articulated a series of distinct, but overlapping rules for interpreting "[f]ederal statutes impinging upon important state interests," *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). First, laws should be construed so as to "avoid significant constitutional and federalism questions," *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 160-61 (2001) (*SWANCC*). Second, the party advocating an interpretation that would disturb the federal balance must point to a clear statement establishing that Congress "ha[d] in fact faced" the federalism consequences, *United States* v. *Bass*, 404 U.S. 336, 349 (1971), and intended them. Courts must likewise apply a general presumption that Congress does not intend to preempt state law, unless that purpose is

"clear and manifest," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *United States* v. *Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (describing preemption doctrine as example of "this Court's * * * participat[ion] in maintaining the federal balance"); *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

Moreover, as the volume and sweep of Executive Branch lawmaking has grown, see *American Trucking Associations, Inc.* v. *Whitman*, 531 U.S. 457 (2001), the Court has recognized that these federalism-reinforcing rules must be applied with "heightened" vigilance when authority for the balance-disrupting result is claimed to derive from a regulation, rather than an Act of Congress. See *SWANCC*, 531 U.S. at 172-73.

The Second Circuit majority did not analyze these principles in depth – acknowledging them only long enough to conclude that they posed no barrier to application of *Chevron* deference. That conclusion reflects a drastic underestimation of the significant federalism questions presented. There is no suggestion in the majority opinion that Congress considered, let alone affirmatively intended or expressly directed, the enforcement regime OCC seeks to establish.

A. The Incursion On State Sovereignty Would Raise Serious Constitutional Questions – Even If it had been Enacted by Congress

The majority below appears to have treated the *SWANCC* principle as speaking only to cases where the constitutional question involves "'the outer limits of [one of] Congress' power[s],'" 510 F.3d at 114 (quoting 531 U.S. at 172); *id.* (noting that national bank regulation "has been 'substantially occupied by federal

authority for an extended period of time'") (quoting *Wachovia Bank, N.A.* v. *Burke,* 414 F.3d 305, 314 (2d Cir. 2005)). To be sure, the particular constitutional doubts raised in *SWANCC* involved the boundary between the legislative jurisdiction conferred on Congress by the Commerce Clause and that which the Tenth Amendment reserves to the States. See *Lopez,* 514 U.S. at 553.

But distinct from its concern for States' regulatory domain, the Constitution requires that federal law "treat the States *in a manner* consistent with their status as residuary sovereigns," *Alden* v. *Maine,* 527 U.S. 706, 748 (1999) (emphasis added). See *New York,* 505 U.S. at 187 ("Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form"); cf. *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.,* 506 U.S. 139, 146 (1993).

The power asserted by the Comptroller works a plain and direct infringement on State sovereignty. States' authority to enforce their laws "derive[s] from separate and independent sources of power * * * originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Heath* v. *Alabama*, 474 U.S. 82, 89 (1985); accord *Diamond* v. *Charles*, 476 U.S. 54, 65 (1986) (describing "the power to create and enforce a legal code, both civil and criminal" as "one of the quintessential functions of a State") (citation and internal quotation marks omitted).

Nor may these statements be read as merely stating the truism that enforcement is needed to make law-making powers meaningful, see *McClesky* v. *Zant,*

499 U.S. 467, 491 (1991) ("the power of a State to pass laws means little if the State cannot enforce them"). On the contrary, it is clear that a State's power over enforcement of its own law is a significant and independent component of its sovereign status. In *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924) – a decision of singular pertinence here, see p. 34, *infra* – the Court specifically recognized that when "the sanction behind [a law] is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter." *Id.* at 660.

Indeed, this Court's classic description of the Constitution's system of dual sovereignty reads like a bill of particulars against the OCC regulation here:

> In their laws, and mode of enforcement, neither [order of government] is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers – are matters subject to their own control, and in the regulation of which neither can interfere with the other.

Tarble's Case, 80 U.S. 397, 407 (1872).

The effect of the OCC Regulation is to convert the States from enforcers of their own laws to federal petitioners, who must depend on the federal regulator to take action. It reassigns the enforcement of New York law (and every other State's) from those sworn, and politically bound, to enforce it, to federal officials for whom compliance with state law is likely to be, at best, a secondary concern. Compare N.Y. Const., art.

XIII, § 1 (oath to protect state constitution) with 5 U.S.C. § 3331 (oath to protect federal Constitution); 12 U.S.C. § 3.

A regime that turns the States into supplicants, dependent on a federal agency for enforcement of their own laws, is no more tolerable under the Constitution than one that treats them as "mere departments of the National Government." *FERC v. Mississippi*, 456 U.S. 742, 795 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). "An essential attribute of the States' retained sovereignty [is] that they remain independent and autonomous within their proper sphere of authority," *Printz*, 521 U.S. at 928.

As these decisions recognize, the powers denied under the OCC Regulation – to decide how and against whom its laws will be enforced – are each part of "how a State defines itself as a sovereign." *Gregory*, 501 U.S. at 461. See *Alden*, 527 U.S. at 751 ("If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State"); *Florida ex rel. Shevin* v. *Exxon Corp.*, 526 F.2d 266, 268 (5th Cir.1976) ("The office of [State] attorney general is older than the United States * * * [H]e typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest"); *id.* n.6 (noting nearly universal practice of making office elective); *Younger* v. *Harris,* 401 U.S. 37, 45 (1971) ("Ordinarily, there should be no interference with [state prosecutors]; primarily, they are charged with the duty of prosecuting offenders

against the laws of the state, and must decide when and how this is to be done") (citation omitted).

A State "has both the right and the authority to select the methods to be used in effectuating its goals." *Sheehy* v. *Big Flats Community Day*, 73 N.Y.2d 629, 634-35 (1989). Its decisions as to how to enforce its law – including the role to provide private enforcement, *Hawaii Medical Ass'n* v. *Hawaii Medical Service Ass'n, Inc.*, 148 P.3d 1179, 1211 (Haw. 2006); the extent of governmental control of litigation, *Consumer Advocacy Group, Inc.* v. *Kintetsu Enterprises*, 150 Cal.App.4th 953, 963 (Cal. App. 2007); the amount of public resources devoted to enforcement, *Olstad* v. *Microsoft Corp.*, 700 N.W.2d 139, 153 (Wisc. 2005); the distribution of decisional authority between administrative and judicial fora, *Case of Dalbec*, 867 N.E.2d 792, 797 (Mass. App. 2007); the amount of sanctions, *State* v. *Irving Oil Corp.*, 955 A.2d 1098, 1107 (Vt. 2008); the applicable limitations period, *Avis* v. *Bd. of Review,* 837 P.2d 584 (Utah Ct. App. 1992), and liability for attorney's fees, *Cogar* v. *Monmouth Toyota*, 751 A.2d 599, 607 (N.J. App. 2000) – are each vital aspects of self-government.

Indeed, the OCC's regime is all the more strange and troubling because it denies power to enforce law *only* to officers primarily vested with that authority – and directly accountable on that basis to the State's citizens. New York's and other States' decisions to provide a private right of action are unaffected. See 510 F.3d at 120 n.9 ("the parties do not dispute that private parties would remain free under the OCC's regulation to bring individual or, where appropriate, class actions against national banks to enforce

compliance with non-preempted state laws, regardless of the subject matter such laws concern").

This enforcement regime, of course is not the one New York (or any State) chose; government enforcement is often necessary to make a right practically effective, see, *e.g.*, *General Tel. Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 326 (1980). It amounts to a complete inversion of ordinary rules, which regard private litigants as distinctly less reliable expositors of the public interest than government officials. See *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring) (preemption of state agency regulation, but not state law tort suits, "would grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative law-making processes"); cf. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397 (1946). As *Alden* explained, with respect to suits by the United States, "[a] suit which is commenced and prosecuted * * * in the name of the [government] by those who are entrusted with the constitutional duty to [enforce the law]* * * differs in kind from the suit of an individual * * * * Suits brought by the [government] itself require the exercise of political responsibility," 527 U.S. at 755. See also *Massachusetts* v. *EPA*, 549 U.S. 497, 518 (2007) ("It is of considerable relevance that the party seeking review here is a sovereign State and not * * * a private individual").

Nor is the Second Circuit majority's related assumption – that divesting States of enforcement power should be treated as a "lesser" intrusion than the "greater" power to preempt their laws entirely – constitutionally valid. See 510 F.3d at 120 (describing

regulation as "preserv[ing] state sovereignty by * * * not preempting state laws").

To begin, the premise that the supposedly "greater power" is even available here is mistaken: the state laws in issue are ones even *the Comptroller* has acknowledged Congress did not intend to preempt. And it was a serious mistake to use decisions sustaining OCC's assertions of administrative preemption as the standard against which to measure other, ostensibly lesser incursions on States' powers. See *id*. at 113 (discussing *Wachovia* v. *Burke*).

Moreover, unlike in the preemption cases most directly provided for under the Constitution, the federal power here is directed *only* against States (and those holding office under them). See *Alden*, 527 U.S. at 714 (noting "the founding generation's rejection of 'the concept of a central government that would act upon and through the States * * * '") (quoting *Printz*, 521 U.S. at 919).[1]

Indeed, this Court in *New York* rejected a fundamentally similar "greater-power-includes-the-lesser" argument – *i.e.*, that a regime that preserved *some* role for the State was inherently less offensive to the Tenth Amendment than would one where Congress acted preemptively. In the latter case, the Court explained, "it is the Federal Government that makes the decision in full view of the public, and it will be

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[1]To be sure, federal preemption is sometimes *effected* through suits enjoining attorneys general, see *Ex Parte Young*, 209 U.S. 123 (1908), but such suits are an incident of the conclusion that the state *law* is, by operation of the Supremacy Clause, void. See *Printz*, 521 U.S. at 914.

federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular," 505 U.S. at 168.

The Comptroller's regime has the same demerit, denying the *people* of New York the power to hold those enforcing their laws accountable. "The Constitution * * * contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. Here, as in *New York*, "[a]ccountability is diminished when * * * elected state officials cannot [make law enforcement decisions] in accordance with the views of the local electorate in matters not pre-empted by federal regulation," 505 U.S. at 169.

Such a federal interposition between the state citizenry and those they select to enforce their laws is fundamentally inconsistent with the principle of "'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Saenz* v. *Roe*, 526 U.S. 489, 504, n.17 (1999) (quoting *U.S. Term Limits,* 514 U.S. at 838 (Kennedy, J., concurring)). Finally, although, this Court has made clear that "it is the very *principle* of separate state sovereignty" that matters most, *Printz,* 521 U.S. at 933, this regime would fare poorly on any balancing test: hundreds, if not thousands, of valid laws enacted at the state level, for the direct protection of state citizens against wrongful behavior, may no longer be enforced there.

B. The Regime Drastically Alters The State-Federal Balance

Constitutional questions aside, this Court's precedents place a heavy burden on statutory interpretations like OCC's, requiring their proponents identify a clear statement, enabling a court to be "absolutely certain" that Congress intended the regime. See *Gregory*, 501 at 464; *Bass,* 404 U.S. at 349; accord *Will* v. *Michigan Dept. of State Police,* 491 U.S. 58, 65 (1989).

The majority below refused to apply that rule, on the ground that "the exercise of 'traditional' state power in the context of national banking regulation is already substantially qualified," 510 F.3d at 114, and that "Congress has already expressed its intent to limit the role of the states in regulating national banks," *id*.

But these are non-sequiturs. First, the *Bass* Court did not confine the principle to interpretations that would depart from some platonic "traditional balance;" it recognized "significant[] change[s]" in the "federal balance" as "traditionally sensitive," 404 U.S. at 359. Indeed, the decisions with which the clear statement rule is associated arose in areas where the federal presence was already substantial: Congress (indeed the Constitution) had "expressed its intent to limit the role of the states" in *Gregory*, which involved an employment discrimination statute specifically directed at the States – and arguably enacted pursuant to § 5 of the Fourteenth Amendment, see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976), and *BFP*, 511 U.S. at 544 & n.8, involved a statute passed pursuant to the power to "establish * * * uniform Laws on the subject of Bankruptcies," U.S. Const., art. I, § 8, cl. 4.

The change to the existing balance sanctioned by the courts below – what the majority described as "accreting a great deal of regulatory authority to [a federal official] at the expense of the states," 510 F.3d 119 – surely rates as "significant." The power to enforce state laws is not one traditionally exercised by the federal government, and while Congress not infrequently incorporates state law *standards* into federal laws (and has, on occasion, directed federal authorities to enforce state law, see, *e.g.*, *Printz*, 521 U.S. at 911), examples of *exclusive* federal enforcement of state laws are vanishingly few.[2] Cf. *id.* at 928 ("It is no more compatible with [State] independence and autonomy that their officers be 'dragooned' * * * into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws") (citation omitted).

The laws affected by the regulation are ones at the unquestioned core of States' police powers. See *Lewis* v. *BT Investment Managers, Inc.,* 447 U.S. 27, 38 (1980) ("both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern"); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624

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[2]The Assimilative Crimes Act, 18 U.S.C. § 13, covers *territory* over which the federal government exercises police powers – and punishment is treated as federal. And unlike here, exclusion of state prosecutors is not accompanied by inclusion of private enforcement. Likewise, 18 U.S.C. § 1166(d), is rooted in Indian Tribes' status as quasi-sovereigns – a status even the OCC has not yet claimed for its national bank constituency.

(1984) (noting that State's civil rights law pre-dated the Civil Rights Act of 1875 "and protect[ed] the State's citizenry from a number of serious social and personal harms"). Indeed, while these matters have long been a subject of legislative activity at the state level, many of the specific measures whose enforcement would be immediately affected were recent enactments, targeting dangerous new abuses – that were producing calamitous effects at the community level. See Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1319-22 (2006).

In concrete terms, the nature and scope of the power shift the regulation purports to effect could only be called dramatic. By a stroke of the Comptroller's pen, responsibility to enforce multiple categories of laws of each of 50 States has been denied to the officials who are most familiar with their meaning and operation and with the local conditions they address – and who would, but for the OCC's action, act attentively to the preferences of the enacting legislatures and the citizens who put them in office.

Moreover, the agency that has overtaken this responsibility is a banking regulator that would be a doubtful choice for primary enforcer of consumer protection and antidiscrimination laws, let alone the diverse laws of fifty States. Despite the OCC's assertion in the rulemaking of a "beli[ef]" that it "has the resources to enforce applicable laws," 69 Fed. Reg. at1915, it does not have procedures for examining compliance with state law, see U.S. G.A.O., OCC PREEMPTION RULES: OCC SHOULD FURTHER CLARIFY THE APPLICABILITY OF STATE CONSUMER PROTECTION

LAWS TO NATIONAL BANKS 22-23 (2006); the responsibilities described would devolve to small numbers of OCC employees; remedies in OCC proceedings are not coextensive with relief available in courts, see 12 U.S.C. § 1818(b); and many of OCC's actions are confidential. See Quester & Keest, *Looking Ahead After Watters v. Wachovia Bank,* 27 REV. BANKING & FIN. L. 187, 235-36 (2008) (noting OCC website informing consumers that, by law, "the OCC cannot release any information relating to any supervisory actions or regarding whether a violation of law or regulation occurred in connection with your complaint"). Thus, even if OCC viewed enforcement of these laws as a genuine priority, but see *infra*, the agency's powers, resources, and expertise are not a minimally plausible substitute for the regime it seeks to displace. See, *e.g.*, Bar-Gil & Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 92 (2008) (contrasting thousands of consumer enforcement actions at state level with a handful by the OCC, noting that OCC's large enforcement actions were begun by state authorities, over OCC objections).[3]

A necessary implication of the Second Circuit's rejection of the clear statement rule is that the disruption of the federal-state balance here is less significant (or less sensitive) than the one presented to

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[3]Indeed, OCC's own counsel has acknowledged that "more than twenty-five years" elapsed between the agency's recognition that it had "authority to enforce the FTC Act" and its first effort to do so. See Williams & Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 BUS. LAW. 1243, 1244 (2003).

the Court in *Bass*. But not only did *Bass* cite the potentially "substantial extension of federal police resources," 404 U.S. at 350, the government's interpretation would entail, as a reason for skepticism (a consideration that weighs much heavier here), but the interpretation rejected in *Bass* would have worked no categorical shift. It would not have denied the States power to continue prosecuting the activity under their laws -- and the federal power contemplated would have been entirely familiar: a United States Attorney's office enforcing federal criminal law before federal courts.

A closer analogy to the facts presented here would be if the government in *Bass* had urged the statute be construed to make federal officials the *only* prosecuting authority for countless state law offenses; administrative tribunals the forum for deciding those cases; and placed enforcement responsibility in the hands of an agency with minimal enforcement resources and modest experience in the criminal justice field.

Hypotheticals aside, it would be difficult to maintain that the actual *Bass* case addressed a more significant or sensitive shift in the federal-state balance than the one disputed here. Without questioning the genuineness of the incipient threat perceived by the *Bass* Court, see *Lopez*, 514 U.S at 615 (Souter, J., dissenting) ("Not every epochal case has come in epochal trappings"), it is significant that no State asked the *Bass* Court to adopt the narrow construction – whereas 46 States participated in this case at the court of appeals level, urging invalidation of the regulation.

Finally, the Second Circuit majority's view suggests an inaccurate understanding of the "historic balance" in "the field of regulation of national banks." First, there is no suggestion that Congress chose to limit state *regulation* in *this* area – the non-preempted laws continue to apply to national banks (nor did the majority below conclude that Congress intended to displace state enforcement – saying only that it had not precluded the OCC from deciding to, see *infra*).

Far from the field preemption regime suggested by the Second Circuit, this Court long ago described the relevant landscape "to contain a rule and an exception-'the rule being the operation of general state laws upon the dealings and contracts of national banks,'" *McClellan* v. *Chipman*, 164 U.S. 347, 357 (1896). See *National Bank* v. *Kentucky*, 76 U.S. 353, 362 (1869) ("national banks are subject to the laws of the State").

Indeed, there is a long history of banks' asserting broad federal immunities – and courts' declining to oblige. Compare 510 F.3d at 114 (describing banks as "creatures of federal statute, * * * subject first and foremost to federal law") with *Atherton*, 519 U.S. at 222-23 ("To point to a federal charter by itself shows no conflict, threat, or need for 'federal common law'"); *St. Louis*, 263 U.S. at 643 (counsel's argument Congress had "occupied the entire field" of national bank regulation); accord *McClellan,* 164 U.S. at 358 (rejecting preemption argument, observing that "in the broadest sense, *any* limitation by a State on the making of contracts is a restraint upon the power of a national bank") (emphasis added).

And while banks and the OCC frequently point to early decisions under the National Bank Act – and

even to the Marshall Court's decisions in *McCulloch* v. *Maryland,* 17 U.S. 316 (1819) and *Osborn* v. *Bank of the United States*, 22 U.S. 738 (1824), as having fixed the balance, those cases focused on state laws' potential to "incapacitate[] the banks from discharging their *duties to the government*," *Kentucky*, 76 U.S. at 362, and such claims were "radically changed" by the 1913 passage of the Federal Reserve Act, 38 Stat. 251, see 12 U.S.C. § 221 *et seq.*, which, "established the Federal Reserve System as the sole monetary and fiscal agents of the United States," *First Agr. Nat. Bank of Berkshire County* v. *State Tax Comm'n*, 392 U.S. 339, 356 (1968) (Marshall, J., dissenting) and "greatly reduced the importance of the distinction between national and nonnational banks," FRIEDMAN & SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES 1867-1960 at 196 (1974).[4]

Whereas, under the original NBA, national banks were recognized to be "National favorites" because "[t]hey were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government," *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. 409,

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[4]The majority in *First Agricultural Bank* found it "unnecessary to reach * * * whether today national banks should be considered nontaxable as federal instrumentalities," concluding that 12 U.S.C. § 548, which allowed taxation in specific areas, impliedly precluded other taxation. *Id.* at 345. Shortly thereafter, Congress amended the provision, subjecting national banks taxation to the same extent as those chartered by the State. See *United States* v. *State Board of Equalization*, 639 F.2d 458, 461 (9th Cir. 1980).

413 (1887), a modern-day national bank "is a privately owned corporation existing for the private profit of its shareholders. It performs no significant federal governmental function that is not performed equally by state-chartered banks," *First Agr. Bank*, 392 U.S. at 354-55 (Marshall, J., dissenting). Cf. *Watson* v. *Philip Morris Companies, Inc.*, 127 S. Ct. 2301, 2307-09 (2007) (private party complying with federal official's order does not "act[] under" the officer, for purposes of removal statute, 28 U.S.C. § 1442(a)(1)).

C. The Judicial Safeguards of Federalism Are Of Greater Importance Where Agency Action Is Involved

Although this Court has explicitly recognized that the canons of construction requiring clear statements have "heightened" force in the context of administrative action, *SWANCC*, 531 U.S. at 172-73, the decision below and others have rejected a similar approach in "ordinary" preemption cases and have instead applied a *de facto* "*Chevron* exception" to general rules for analyzing assertions of federal preemption, according broad deference to federal agency rules purporting to declare State laws preempted on "frustration of purpose" grounds or advancing aggressive interpretations of express preemption clauses – and accepting with an uncritical eye assertions of congressional authorization of regulations with substantial State-law displacing effect.

These broad extensions of *Chevron* deference are neither logical nor reconcilable with this Court's precedent. To allow State law to be displaced based on silence or ambiguity in a federal statute, *Chevron,* 467 U.S. at 843, is at odds with the rule that displacement

requires a showing of "clear and manifest" congressional intent, *Rice,* 331 U.S. at 230, just as the directive that courts accept agency constructions that "differ[] from what the court believes is the best statutory interpretation," *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967, 980 (2005), is not readily squared with the rule that courts must read ambiguous preemption clauses in a way "that disfavors pre-emption," *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

A rule more accepting of claims of administrative than statutory preemption is irreconcilable with basic constitutional norms. Such a rule would evade the very "political process" that modern constitutional law relies on to protect States' interests. See *Gregory*, 501 U.S. at 464; *INS* v. *Chadha,* 462 U.S. 919, 953 (1983) (discussing bicameralism and presentment requirements, U.S. Const., art. I, § 7, for exercise of legislative power). States are not represented in Executive Branch agencies, and regulations do not require concurrence of two branches. Nor may the Court's acknowledgment that "the state-displacing weight of federal law" should not be given to "mere congressional *ambiguity*," *Gregory*, 501 U.S. at 464 (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6.25, p. 480 (2d ed. 1988)), fairly be limited to a narrower class of especially sensitive statutes; by its terms, the statement describes "ordinary" preemption, and *Gregory* itself describes its plain statement rule as rooted in preemption case law. See *id.* at 460-61 (citing, *inter alia*, *Rice*, 331 U.S. at 230).

Moreover, the premises underlying the *Chevron* doctrine, that agencies have greater expertise and democratic accountability than do courts – have less

force in preemption cases. Preemption is, after all, a constitutional question, U.S. Const. art. VI, § 2, and agency expertise in statutes they administer is not matched by sensitivity to policies and purposes served by State law. Thus, while examples abound of courts' undertaking to conserve State law and rejecting overbroad preemption assertions, agencies are more likely to take a maximalist approach, see *infra*. And to the extent *Chevron* deference rests on a presumption that silence or ambiguity ordinarily is intended to be a delegation, that premise is empirically more questionable and legally more problematic where displacement of state law is concerned. States look to federal *courts* rather than federal agencies for a fair hearing – and to maintain balance. See *Lopez*, 514 U.S.

Finally, a legal regime that makes Congress the "tryout on the road" and agency rulemaking the "main event," see *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977), for preemption questions – thereby relieving parties seeking preemption of the "obligation to pull, haul, and trade," *Johnson* v. *De Grandy*, 512 U.S. 99, 1020 (1994), in the legislative arena – makes it especially likely that the constitutionally-contemplated deliberation will *not* occur.

This does not mean that administrative regulations may never be given preemptive effect. But "[t]he purpose of Congress" should remain "the 'ultimate touchstone' in *every* pre-emption case." *Medtronic,* 518 U.S. at 485 (emphasis added) (citation omitted). See *Louisiana Public Serv. Comm'n* v. *FCC,* 476 U.S. 355, 369 (1986)) ("[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law"). And there is,

for a preemption purposes, "a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation." *Watters* v. *Wachovia Bank,* 127 S. Ct. 1559, 1583 (2007) (Stevens., J, dissenting). Practical realities aside, it is a long constitutional leap from treating a valid regulation as a "law" for purposes of the Supremacy Clause, *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985) – and therefore enjoining inconsistent state laws – to giving binding effect to an agency's broad assertions about a state law's capacity to impair the "purposes" of a federal statute. Wholesale declarations of federal exclusivity are unlikely to rest on any particularized exercise of agency expertise, and highly likely to reflect agencies' political remoteness from, or even hostility to, state interests.

D. There is No "OCC Exception" To These Principles

Reasons for close judicial review apply with full force where the OCC is concerned. There can be no expectation that, in resolving conflicting claims of State and federal power, the Comptroller may be relied on to "hold the balance true," *Illinois* v. *Gates*, 462 U.S. 213, 241 (1983). Even leaving aside nonaccountability to the citizens of the affected States, see *supra*, the Comptroller is less *federally* accountable than most Executive Branch officials: the President's appointment and removal powers are constrained, 12 U.S.C. § 2; the Secretary of Treasury is forbidden from "delay[ing] or prevent[ing] the * * * promulgation of any regulation by the Comptroller," *id.* § 1; and, quite unusually, the agency does not depend on

congressional appropriation for its operations. Bar-Gil & Warren, *supra*, at 93.

Instead, the Office's budget is funded almost entirely by assessments against the parties it regulates. *Id.* ("[A]ssessments comprise 95% of the OCC's budget"). And more unusually still, its jurisdiction over these institutions is a matter of volition on *their* part. Thus, in 2004-2005, in the immediate wake of the regulation at issue here, "charter conversions of three large [institutions] * * * resulted in the transfer of $1 trillion of banking assets into the OCC's jurisdiction * * * and raised assessment revenues by 15%," *id.* at 93 & n.300. Cf. *Tumey* v. *Ohio*, 273 U.S. 510 (1927). Finally, the Office historically has done little to separate its roles as decider of preemption questions and participant in the competition for financial institutions' allegiance. See, *e.g.*, Speech by Comptroller John D. Hawke, Jr. (Feb. 12, 2002) (describing preemption as "a significant benefit of the national [bank] charter – a benefit that the OCC has fought hard over the years to preserve"), quoted in Wilmarth, *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection,* 23 ANN. REV. BANKING & FIN. L. 225, 274 (2004).[5]

As this case attests, OCC has increasingly eschewed preemption doctrines that would depend on considering

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[5]State chartering authorities do not compete on this basis: they cannot preempt state laws, and they share oversight authority with the FDIC and the Federal Reserve and are subject to the enforcement authority of State Attorneys General.

(or demonstrating in court) that a particular state law (or enforcement of state law) imposes an *actual*, substantial burden on a congressional objective or an actual conflict with an agency regulation on the same subject; it has gravitated instead toward claims that *any* state regulation is an impermissible condition on or impairment of congressionally-conferred powers, or, as here, an invasion of some broadly-defined exclusive jurisdiction – without any claim that the Comptroller has regulated in the field or intends to (or even has affirmatively concluded that regulation is undesirable). See 510 F.3d at 118-119 (noting that instead of "articulat[ing some] rational connection between * * * facts found and the choices made," "the OCC does not appear to have found any facts at all," and relied "almost entirely [on] the agency's interpretation of case law, legislative history, and statutory text") (citation omitted); *Perdue* v. *Crocker National Bank*, 702 P.2d 503, 525 (Cal. 1985) (refusing to "presume, without evidence, that prohibiting a national bank from setting unreasonable prices or enforcing an unconscionable contract will render that bank less efficient, less competitive or less able to fulfill its function in a national banking system").

Unlike federal courts, which are obliged to (and do) search for alternatives that would allow accomplishment of federal objectives while minimizing displacement of state law, the OCC has treated assertions of national "uniformity" and "unitary regulation" as unanswerable – even in cases, like this one, where they are not even logically relevant, see *infra*. See Bar-Gil & Warren, *supra*, at 92; *Atherton*, 519 U.S. at 220 ("To invoke the concept of 'uniformity,' however, is not to prove its need"). Compare *Egelhoff*,

532 U.S. at 160 (Breyer, J., dissenting) (describing courts as "apply[ing] pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy").

The OCC has taken a "preempt first, ask questions later" approach, offering scant support for critical empirical assertions, including that it "has the resources to enforce applicable laws [and] * * * ensure that consumers are adequately protected," 69 Fed. Reg. at 1915. Indeed, even when it has purported merely to restate "judicial precedent," OCC has taken a tendentious approach. Thus, while this Court's decision in *Barnett Bank of Marion County* v. *Nelson*, 517 U.S. 25 (1996), described preemption as reaching state laws that "*forbid*, or * * * *impair significantly*, the exercise of a power that Congress explicitly granted," *id.* at 33 (emphasis supplied), OCC has omitted the word "significantly," substituted "authorized" for "power explicitly granted," and indicated that anything less than "full[] exercise" constitutes an actionable frustration of congressional purposes. See 12 C.F.R. § 7.4009(b); Wilmarth, *supra* at 247 & n.81.

These actions have occurred at a fateful moment. State governments, closer to the people, were the first to see – and then to experience – the predatory lending and foreclosure crises and sought to enact laws pursuant to their historic powers and enforce these against wrongdoing financial institutions, without regard to the identity of the chartering authority. See Wilmarth, *supra* at 253-65. The adverse effects of the

OCC's brushing aside of vast tranches of state regulation are not merely theoretical.

II. No Permissible Construction of The Act Supports The OCC's Asserted Power

In sustaining the regulation, the court below stopped short of saying that the regime was intended by Congress; rather, the panel stated that it did not "agree * * * that the statute clearly precludes the interpretation the OCC has adopted," 510 F.3d at 117. Indeed, as the majority opinion attests, the regulation could not even survive a junior version of the clear statement rule: even if it were not established that *Congress* must face these issues, *the agency* here "accret[ed] a great deal of regulatory authority to itself at the expense of the states," without "hav[ing] found any facts at all" in a rulemaking that "lacked any real intellectual rigor or depth"– and offered only "cursory analysis," 510 F.3d at 119.

The court instead concluded that this absence of a clear contrary statement, along with "[im]precis[ion]" as to the "scope of 'visitorial' powers," and a grant of general rulemaking power, 12 U.S.C. § 93a, sufficed to entitle the regulation to *Chevron* deference. The court then pronounced itself satisfied that "the OCC reached a permissible accommodation of conflicting policies." 510 F.3d at 120. This was misguided.

First, as this Court has repeatedly explained, it is the presumed congressional delegation, not verbal ambiguity itself, that supplies agency power, *Gonzales*, 546 U.S. at 255, and agency assertions remain subject to testing for plausibility. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *Christensen* v. *Harris County*, 529 U.S. 576, 590 n. *

(2000) (Scalia, J., concurring in part and concurring in judgment). The fact that Congress did not expressly confirm States' power to enforce their own non-preempted laws is no delegation: "A 'gap' is not created in a statutory scheme merely because a statute does not restate [a] truism," *Adams Fruit Co., Inc.* v. *Barrett*, 494 U.S. 638, 649 (1990). And this case is surely one where common sense, see *Gonzales*, 546 U.S. at 274, no less than constitutional principle, warns against the agency's claim. See *id.* at 267 ("the idea that Congress gave * * * such broad and unusual authority through an implicit delegation is not sustainable").

These concerns aside, the OCC's purported reinterpretation of "visitation" is simply not a permissible one. Whatever uncertainty might attend the term's "*precise* scope," 510 F.3d at 117 (emphasis added), the text of § 484(a) is unambiguous in the respect relevant here: Nothing in its language is open to the interpretation *the OCC* sought to impose – as contemplating two classes of state laws: one, conventionally preempted (*e.g.*, those which would authorize state examiners to supervise national banks) and a second, enforceable against banks, but only by the federal government (and such private parties as a State has authorized). See *MCI Telecommunications Corp.* v. *AT&T Co.*, 512 U.S. 218, 231 (1994).

On the contrary, although the statutory term has limited modern resonance, definitions and practice contemporaneous to the NBA's enactment make clear that "visitation" refers to the authority of the chartering authority (or donor, in the case of a charity) to assure that the corporation is staying within the powers granted and the by-laws established for it. See

Trustees of Dartmouth College v. *Woodward,* 17 U.S. 518, 595, 676 (1819) (equating charter as a contract and by-laws as "its statutes"). On this understanding, the chartering authority has exclusive responsibility for examining the corporation and assuring compliance with "its [the corporation's] laws" – but that would not preclude other sovereigns from enforcing *their* otherwise applicable, general laws.

Remarkably, the very claim at issue here was advanced – unsuccessfully – in *St. Louis*. There, the Comptroller argued that, preemption aside, the predecessor version of the "visitorial powers" prohibition was an independent bar to the Missouri Attorney General's enforcing his State's anti-branching law against a national bank. See 263 U.S. at 643 (counsel's argument). After holding the law not preempted, the Court rejected the Comptroller's claim in emphatic terms. "[T]hat the United States alone may inquire * * * whether a national bank is acting in excess of its charter powers," the Court explained, was beside the point – because:

> What the state is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation.

Id. at 660.

The OCC's 2004 "reinterpretation" repeats the very same "complete misconception," *id*., this Court identified in its 1924 argument.[6]

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[6]Nor does any other decision cited in the OCC's rulemaking suggest the critical ambiguity the Comptroller

Finally, in pronouncing the rule "reasonable," the decision below did not apply the "rigor" it rightly found lacking from the OCC's analysis. Not only did the court allow the agency to displace States without any factual finding, but it uncritically accepted generic policy "interests," that, while typically helpful to OCC preemption claims, do not in fact support this one. This regulation *does not* in fact "prevent inconsistent * * * state regulation," 510 F.3d at 111 – it purports to respect, *not preempt* state laws – which are, by their nature, inconsistent; and, to the extent private lawsuits qualify as "state regulation," it preserves them, as well. Nor, by this token, does it assure that national banks answer to a single regulator, *id.* at 120: under the regime, they will answer to juries in state court class action lawsuits, as well as the OCC – just not state law enforcement officials.

Conclusion

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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professed to rely on: the most plausible support OCC summons turns out to be an artifact of its own paraphrasing. *Guthrie* v. *Harkness*, 199 U.S. 148, 159 (1905) *did not* equate visitation with "enforc[ing] observance of *the* laws and regulations," 69 Fed. Reg. at 1899 (emphasis added) but rather "*its*," – *i.e.*, *the corporation's* – laws, 199 U.S. at 159 (emphasis added) (citation omitted).

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